

Decision 05-04-022 April 7, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Pacific Gas and Electric Company (U 39 M) for an Order Authorizing Pacific Gas and Electric Company to Grant an Easement to Triad Communities, L. P. to Maintain Slope Stabilization Improvements.

Application 04-04-009
(Filed April 8, 2004)

**OPINION GRANTING APPROVAL UNDER PUB. UTIL. CODE
§ 851 FOR CONVEYANCE OF EASEMENT BY PACIFIC GAS
AND ELECTRIC COMPANY TO TRIAD COMMUNITIES, L. P.
TO MAINTAIN SLOPE STABILIZATION IMPROVEMENTS**

1. Summary

This decision grants the unopposed application¹ of Pacific Gas and Electric Company (PG&E) for Commission authorization under Pub. Util. Code § 851² for PG&E to convey a permanent easement to Triad Communities, L.P. (Triad), so that Triad can maintain slope stabilization improvements on PG&E property in Solano County. The slope stabilization improvements are necessary to prevent soil movement and hillside erosion that could damage PG&E's property and create a safety hazard.

¹ The application was filed on April 8, 2004. In Resolution ALJ 176-3132, dated April 22, 2004, we preliminarily categorized this proceeding as ratesetting and preliminarily determined that hearings are unnecessary. No protests to the application were filed.

² All statutory references are to the Public Utilities Code unless otherwise referenced.

2. Background

A. The Project

PG&E is applying for authorization to grant a permanent easement for slope stabilization improvements to Triad across a parcel of PG&E land in Solano County that is known as Eastern Swett Ranch. The Solano County Farmlands and Open Space Foundation (Solano County Foundation) holds an option to purchase this property.³

Triad owns land adjacent to Eastern Swett Ranch that Triad is developing as the site for a residential subdivision. According to the application, during preparation of the site, Triad cut into a portion of the hillside in order to grade the property. Triad's grading activities destabilized the hillside, which necessitated slope stabilization improvements to prevent soil movement and hillside erosion onto PG&E's land. In addition, without PG&E's knowledge or consent, Triad moved a fence that marked PG&E's property line and excavated a benched cut into PG&E's property, which was to be backfilled with "engineered" backfill and geogrid reinforcing fabric in order to stabilize the slope.

According to the application, after PG&E discovered Triad's unauthorized activities, PG&E determined that since the rainy season was approaching, the best course of action was to permit Triad to complete the slope stabilization improvements in order to avoid a safety hazard and the risk of serious damage to PG&E's property. PG&E therefore entered into a revocable license agreement with Triad on November 5, 2003 pursuant to General Order

³ The Commission previously approved PG&E's proposed sale of Eastern Swett Ranch to the Solano County Foundation in Decision (D.) 01-05-076.

(GO) 69-C (the license) so that Triad could enter the property and complete the slope stabilization improvements.

PG&E now wishes to convey a permanent easement to Triad so that Triad may maintain the slope stabilization improvements. If the easement is approved, Triad will pay PG&E \$1,000 for the easement.

**B. The Proposed Easement Agreement
between PG&E and Triad**

In the proposed easement agreement, PG&E grants Triad a non-exclusive easement for the purpose of performing maintenance, grading slopes, and constructing drainage facilities, such as drains, culverts and filter blankets, on the property. Triad may not assign the agreement with PG&E.

Triad may not erect or construct buildings or improvements on the easement area, except as necessary to maintain the slope. PG&E must approve any improvements or structures to be constructed on the easement area.

Triad has agreed not to interfere with PG&E's use of its property or to engage in activities on the site that would place PG&E in violation of applicable Commission General Orders or legal requirements. Triad must also conduct its activities in a manner that does not endanger PG&E property or facilities, the environment, or human health. If PG&E determines that any of Triad's activities on the site create a health or safety risk, PG&E may require Triad to stop its activities until appropriate protective measures are taken.

Under the agreement, PG&E retains the right to restrict Triad's access to the site when appropriate based on events affecting PG&E's business operations, in emergency situations, or when PG&E needs to perform maintenance in the area.

Triad must maintain its facilities and improvements on the site in good condition, repair any damage it may cause to PG&E facilities on or around the

easement area, erect a fence or otherwise enclose the easement area when construction is being performed, and prevent vehicles from entering the easement area.

In addition, Triad must maintain the graded slopes and drainage facilities and take necessary action to prevent damage from earth slides or earth subsidences, including those caused by erosion and earthquakes. If earth slides or earth subsidences occur, Triad must repair, remove, or reconstruct the slide area, including installing additional facilities to prevent recurrences of earth slides or earth subsidences.

If Triad fails to perform any act or obligation required by the agreement, PG&E may, after giving Triad 15 days advance notice, perform the necessary act or obligation itself, and recover the costs from Triad.

Triad has agreed to indemnify, protect, defend and hold harmless PG&E from any and all claims, losses or liability arising out of or connected with Triad's occupancy or use of the easement area or Triad's activities under the agreement. This indemnification includes, but is not limited to, claims or liability for: 1) personal injury or death, 2) property damage, and 3) violation of legal requirements, including those related to human health or the environment, except for claims or liability resulting from the sole negligence or willful misconduct of PG&E. Triad has acknowledged that it is indemnifying PG&E for all claims or liability arising out of or connected with landslides, earth movement, erosion, or releases of hazardous substances that may occur as a result of Triad's occupancy or use of the easement area or the surrounding PG&E property or from any of Triad's activities. Under the agreement, Triad is responsible for all costs and expenses for environmental investigations, and any

monitoring, containment, removal, repair, cleanup, restoration or remediation at the site.

**C. The Previous License Agreement
between PG&E and Triad**

The revocable license agreement entered into by PG&E and Triad in November 2003 granted Triad a temporary right of entry onto the easement area to perform grading and erosion control activities at Triad's expense. Triad paid PG&E \$350 as a license fee.

The term of the license was 18 months. However, under the agreement, PG&E retained the right to terminate the lease at any time, for any reason or no reason, after giving 30 days advance written notice to Triad.

Triad agreed to accept the site in its "as is" condition, to perform its activities in a way that did not place PG&E in violation of Commission General Orders or legal requirements, and did not interfere with PG&E's operations on the site or with service to PG&E customers. Triad also indemnified and held harmless PG&E from claims, liability or damages connected with its activities on the easement area pursuant to the license.

D. Environmental Review

The California Environmental Quality Act (Public Resources Code Section 21000, *et seq.*, hereafter CEQA), applies to discretionary projects to be carried out or approved by public agencies. A basic purpose of CEQA is to "inform governmental decision-makers and the public about the potential, significant environmental effects of the proposed activities." (Title 14 of the California Code of Regulations, hereinafter CEQA Guidelines, Section 15002.)

Since the proposed project is subject to CEQA and the Commission must issue a discretionary decision without which the project cannot proceed (*i.e.*, the Commission must act on the § 851 application), this Commission must

act as either a Lead or a Responsible Agency under CEQA. The Lead Agency is the public agency with the greatest responsibility for supervising or approving the project as a whole (CEQA Guidelines Section 15051(b)).

Here, the City of Vallejo (City) is the Lead Agency under CEQA for the Triad Community Development Project, including the slope stabilization improvements for which PG&E seeks § 851 authority to grant a permanent easement to Triad Communities, L.P. The Triad Community Development Project was originally granted a permit by the City of Vallejo pursuant to Resolution No. 96-447 N.C., adopted by the Vallejo City Council on December 10, 1996. In support of the Resolution, the City of Vallejo prepared and approved an Initial Study in compliance with CEQA that found that the Triad Community Development Project would have no significant effect on the environment, provided that specific mitigation measures identified in the Initial Study were implemented. The Initial Study identified the grading and slope stabilization issues associated with the Project, including the issues specific to the adjacent PG&E property that is the subject of this Application, and provided specific mitigation measures designed to address the potential impacts of the slope stabilization effort. The City of Vallejo concluded that the Triad Community Development Project would not have a significant effect on the environment. Subsequently, on June 18, 2003, the City of Vallejo adopted a Mitigated Negative Declaration and made the necessary mitigation measures a condition of project approval. A Notice of Determination was filed with the County of Solano on July 31, 2003.

The Commission is a Responsible Agency for the project under CEQA. CEQA requires that the Commission consider the environmental consequences of a project that is subject to its discretionary approval. In particular, the

Commission must consider the Lead Agency's environmental documents and findings before acting upon or approving the project. The specific activities a Responsible Agency must conduct are contained in CEQA Guidelines Section 15096.

PG&E seeks authority in this Application to grant a permanent easement to Triad Communities, L.P. to maintain in perpetuity slope stabilization improvements that have already been completed (on an emergency basis under a limited license) on PG&E property as part of Triad's residential subdivision development on adjacent land. Triad's project destabilized a hillside, and slope stabilization efforts extending onto PG&E's land were necessary in order to prevent soil movement or hillside erosion. These efforts were undertaken by Triad without the knowledge or consent of PG&E. Upon discovery of the slope stabilization problem and Triad's efforts to address the issue, PG&E determined that there was significant risk of property damage if the slope stabilization efforts remained incomplete. PG&E and Triad executed a license agreement pursuant to General Order 69-C for the limited purpose of permitting Triad to enter PG&E's property and complete the slope stabilization. A condition of the license agreement was a requirement that Triad enter into a permanent easement agreement, subject to Commission approval, agreeing to maintain the slope stabilization in perpetuity. The easement compels Triad and its successors-in-interest to maintain the slope in perpetuity, and it protects PG&E and ratepayers from any future liability associated with the slope.

In this application, PG&E requests that the Commission find that there will be no significant environmental impact associated with the authorization of the lease between PG&E and Triad. In support of its request, PG&E has provided both the Notice of Determination (NOD) for the Mitigated Negative

Declaration and the Initial Study developed by the City of Vallejo for the community development project and submitted to the County of Solano on July 31, 2003. We have reviewed the NOD and associated Initial Study for the Triad Community Development Project (Exhibit D of the Application) and find these documents adequate for our decision making purposes.

We find that the City of Vallejo reasonably concluded that the slope stabilization improvements, and the activities required to maintain those improvements, associated with the Triad Community Development Project described above would have no significant impact on the environment. We adopt that finding and the associated mitigation measures for purposes of our approval.

E. Ratemaking Considerations

The PG&E land involved in this application is not used for utility purposes and is therefore not included in PG&E's ratebase. PG&E therefore proposes to record the \$1,000 fee received from Triad for the easement as a gain to shareholders pursuant to D.01-05-076. This treatment of revenues from the proposed easement is unopposed.

2. Discussion

Section 851 provides that no public utility "shall . . . encumber the whole or any part of . . . property necessary or useful in the performance of its duties to the public, . . . without first having secured from the Commission an order authorizing it to do so." Since the easements proposed to be conveyed to the County would be encumbrances on PG&E property, we apply § 851 in considering this application.⁴

⁴ Decision (D.) 01-08-069.

The primary question for the Commission in § 851 proceedings is whether the proposed transaction is in the public interest. In reviewing a § 851 application, the Commission may “take such action, as a condition to the transfer, as the public interest may require.”⁵ The public interest is served when utility property is used for other productive purposes without interfering with the utility’s operation or affecting service to utility customers.⁶

We find that PG&E’s conveyance of the proposed easement to Triad would serve the public interest. The proposed easement will not interfere with PG&E’s use of the property or with service to PG&E customers, and will be utilized in a manner consistent with Commission and legal requirements. PG&E’s conveyance of the easement to Triad will also serve the public interest by allowing Triad to maintain slope improvements in order to avoid safety hazards and/or serious damage to PG&E property that could result otherwise result from erosion, earth slides, or earth subsidences onto the easement area.

We also approve the proposed ratemaking treatment for the compensation that the County will pay to PG&E for the easements. Since the property is not used for utility purposes and is not in PG&E’s ratebase, it is appropriate for the easement fee to be recorded as a gain to shareholders.

We note that the Commission generally does not approve transactions in which a public utility enters into a license under G.O. 69-C for the purpose of conveying an interest in property if the transaction would otherwise be subject to our approval under § 851, particularly when the intent of such transactions is to

⁵ D.3320, 10 CRRC 56, 63.

⁶ D.00-07-010 at p. 6.

circumvent Commission review under CEQA and § 851.⁷ However, here, it appears that the license entered into by PG&E and Triad may have qualified for an exemption from § 851 under G.O. 69-C.⁸ Moreover, even if PG&E could not properly enter into the license pursuant to G.O. 69-C because Triad constructed slope stabilization improvements on PG&E's property that were significant or could not be easily removed,⁹ PG&E needed to permit Triad to complete this work without delay in order to avoid safety hazards and the risk of serious property damage. The CEQA review performed by the City of Vallejo also

⁷ D.04-10-036

⁸ G.O. 69-C permits public utilities to convey limited interests in their property, such as revocable licenses, under narrowly defined circumstances as an exception to § 851. However, under G.O. 69-C, a transfer of an interest in utility property must meet three key criteria in order to be exempt from the requirements of § 851:

- (1) The interest granted must not interfere with the utility's operations, practices and service to its customers;
- (2) The interest granted must be revocable either upon the order of the Commission or upon the utility's determination is desirable to serve its patrons or consumers; and
- (3) The interest must be granted for only "limited" uses of utility property. *Id.*

Here, PG&E license granted to Triad for completion of the slope stabilization improvements clearly met the above two criteria, because the license required Triad to carry out its activities in a way that did not interfere with PG&E's operations or use of its property and PG&E retained the right to terminate the license upon notice to Triad. However, it is uncertain whether the license conveyed only a limited use of PG&E's property. The license permitted Triad to perform grading and erosion control activities, but the record contains no evidence regarding the specific work, including any construction, that Triad performed on PG&E's land. Under G.O. 69-C, the construction of facilities or improvements that are significant or cannot be easily removed does not qualify as a "limited" use of utility property, and the utility must generally seek § 851 approval and undergo CEQA review before permitting this type of construction. *Id.*

⁹ See Note 8 above.

addressed the slope stabilization improvements. Under these unique circumstances, we would not penalize PG&E for entry into the revocable license without first seeking our approval under Section 851 even if Triad's activities under the license are not a "limited" of utility property under G.O. 69-C.¹⁰

However, PG&E is advised to promptly apply for § 851 approval if future situations arise which require PG&E to convey more than a "limited" interest in utility property or to permit the construction of improvements or structures that are significant or cannot be easily removed from utility property. In emergency situations, PG&E may also apply for exemption from the requirements of § 851 pursuant to § 853(b).^{11 12}

¹⁰ Furthermore, PG&E would most likely qualify for an exemption from the requirements of § 851 for the license pursuant to § 853(b), because PG&E had a pressing need to have Triad complete the slope stabilization improvements, the license permitted Triad to perform only a limited scope of work, and neither Triad's activities on the site nor the slope stabilization improvements interfered with PG&E's operations or service to customers. *See D. 01-08-070*. Under these unique circumstances, permitting Triad to complete the slope stabilization improvements without the delay associated with an application for approval under § 851 was in the public interest.

¹¹ § 853(b) states in pertinent part:

The commission may from time to time by order or rule...exempt any public utility or class of public utilities from this article if it finds that the application thereof with respect to the public utility or class of public utility is not necessary in the public interest... .

For all of the foregoing reasons, we grant the application of PG&E pursuant to § 851, effective immediately.

3. Final Categorization and Waiver of Review Period

Based on our review of this application, we conclude that there is no need to alter the preliminary determinations as to categorization and need for a hearing made in Resolution ALJ 176-3132, dated April 22, 2004. Moreover, since this proceeding is uncontested and we grant the relief requested, pursuant to § 311(g)(2), the otherwise applicable 30-day period for public review and comment is waived.

4. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Myra J. Prestidge is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The proposed easement will not interfere with PG&E's use of the property or with service to PG&E's customers, and will be utilized in a manner consistent with Commission and legal requirements.

2. The City of Vallejo is the Lead Agency for the proposed project under CEQA.

3. The City of Vallejo prepared an Initial Study pursuant to CEQA to review the potential environmental impacts of the Triad Community Development

¹² See D.01-08-070.

Project and determined that, with identified mitigation, the project would have no significant impact on the environment.

4. The City of Vallejo also prepared a mitigated negative declaration pursuant to CEQA for the Triad Community Development Project.

5. Triad was granted a permit for the planned development by the City of Vallejo pursuant to Resolution No. 96-447 N.C., adopted by the Vallejo City Council on December 10, 1996.

6. The City of Vallejo adopted the Mitigated Negative Declaration on June 18, 2003.

7. The City of Vallejo adopted the mitigation measures identified in the Mitigated Negative Declaration as conditions of project approval.

8. The City of Vallejo filed a Notice of Determination for the project with the County of Solano on July 31, 2003.

9. The Commission is a Responsible Agency for the proposed project under CEQA.

10. The easement will enable Triad to maintain slope stabilization improvements on PG&E land that are necessary to avoid safety hazards and the risk of damage to PG&E property.

11. The easement area is located on PG&E property that is not used for utility purposes and is not included in PG&E's ratebase.

12. At the time of its entry into the license with Triad, PG&E needed to have Triad complete the slope stabilization improvements without delay to avoid a safety hazard and the risk of serious damage to PG&E property.

13. Although the term of PG&E's license with Triad was 18 months, PG&E retained the right to terminate the license, with or without any reason, at any time upon giving Triad 30 days advance written notice.

14. Triad's slope stabilization activities under the license did not interfere with PG&E's operations, use of the site, or with service to PG&E's customers.

Conclusions of Law

1. We have reviewed the City of Vallejo's environmental documents and find them to be adequate for our decision-making purposes.

2. We find that the City of Vallejo reasonably concluded that the slope stabilization improvements contemplated by the Triad Community Development Project as mitigated, would not have a significant effect on the environment, and we adopt the City's findings and required mitigation measures for the purposes of our approval.

3. No protests have been filed.

4. A hearing is not required.

5. PG&E's conveyance of the permanent easement for slope stabilization improvements to Triad will serve the public interest and should be authorized.

6. The Commission does not generally approve transactions in which a utility enters into a license pursuant to G.O. 69-C in order to circumvent the requirements for CEQA review and Commission approval pursuant to § 851.

7. Under G.O. 69-C, a public utility, such as PG&E may convey a limited interest in utility property, such as a license, without first obtaining our approval under Section 851 if the following three criteria are met: 1) the interest granted must not interfere with the utility's operations, practices and service to its customers; 2) the interest granted must be revocable either upon the order of the Commission or upon the utility's determination that revocation is desirable to serve its patrons or consumers; and 3) the interest must be granted for only a "limited" use of utility property.

8. The construction of facilities or improvements that are significant or cannot be easily removed from utility property does not qualify as a “limited” use of utility property pursuant to G.O. 69-C.

9. Under § 853(b), the Commission may exempt a public utility from the requirements of § 851 in appropriate circumstances when the application of § 851 is not necessary to serve the public interest.

10. Under the unique circumstances of this case, even if PG&E could not properly grant Triad a license to complete the slope stabilization improvements on PG&E land because the work performed by Triad did not constitute a “limited” use of utility property, PG&E would most likely qualify for an exemption from § 851 pursuant to § 853(b) for this transaction because Triad’s completion of the slope stabilization improvements without delay served the public interest.

11. Since the easement area is located on PG&E property that is not used for utility purposes and is not in PG&E’s ratebase, it is appropriate for the easement fee to be recorded as a gain to PG&E’s shareholders.

12. The decision should be effective today in order to allow the permanent easement to be conveyed to Triad expeditiously.

O R D E R

IT IS ORDERED that:

1. Pacific Gas and Electric Company (PG&E) is authorized to convey a permanent easement for slope stabilization improvements, described in the Application, to Triad Communities, L. P. (Triad), provided that the mitigation measures required by the City of Vallejo in its Mitigated Negative Declaration for

the Triad Communities project be incorporated as enforceable provisions of the easement agreement between PG&E and Triad.

2. When the final easement documents are executed, PG&E shall submit a copy of those documents to the Director of the Energy Division within sixty (60) days of this order.

3. PG&E shall submit a legal description and plat of the easement area to the Director of the Energy Division by advice letter within sixty (60) days of this order.

4. PG&E shall credit the easement fee of \$1,000 to as a gain to shareholders.

5. This proceeding is closed.

This order is effective today.

Dated April 7, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH
Commissioners